

THE STATE OF NEW HAMPSHIRE

ATTORNEY GENERAL
GREGORY H. SMITH

DEPUTY ATTORNEY GENERAL
PETER W. MOSSEAU

ASSISTANT ATTORNEYS GENERAL
JOHN T. PAPPAS
ANNE R. CLARKE
MARC R. SCHEER
DONALD J. PERRAULT
MARTIN R. JENKINS
BETSY S. WESTGATE
EDWARD L. CROSS, JR.
PETER C. SCOTT
MICHAEL A. PIGNATELLI
BRIAN T. TUCKER
PAUL BARBADORO
BRUCE E. MOHL



THE ATTORNEY GENERAL

STATE HOUSE ANNEX

25 CAPITOL STREET

CONCORD, NEW HAMPSHIRE 03301-6397

ASSISTANT ATTORNEYS GENERAL
JOHN A. MALMBERG
DOUGLAS L. PATCH
LORETTA S. PLATT
ROBERT P. CHENEY, JR.
LESLIE J. LUDTKE
ANDREW L. ISAAC
RONALD F. RODGERS
G. DANA BISBEE
PETER T. FOLEY
STEVEN M. HOURAN
JEFFREY R. HOWARD
EVE H. OYER
GREGORY W. SWOPE

ATTORNEYS
DANIEL J. MULLEN
JAMES D. CAHILL, III
EDNA M. CONWAY
AMY L. IGNATIUS
T. DAVID FLOURDE

November 15, 1983

Dr. Robert L. Brunelle, Commissioner
Department of Education
State House Annex
Concord, New Hampshire 03301

Dear Dr. Brunelle:

You have requested this department's advice as to whether the State Board of Education has authority to adopt an amendment to ED 511.17 which would require that school nurses hold a Bachelor's degree in nursing, satisfy certain course-work, and have two years' experience in child health. We conclude that the existing statutes preclude the adoption of the proposed amendment to ED 511.17.

Board rule-making authority is conferred on the State Board of Education under RSA 186:5. This section provides that the Board "may make all rules and regulations necessary for the management of its own business and for the conduct of its officers, employees, and agents, and to secure the efficient administration of the public schools...." The duties of the Board in operating the schools are further defined in RSA 186:11. Among the duties stated in this section is the "authority to employ a competent person or persons to examine and care for the health of pupils, subject to the provisions of RSA 200." RSA 186:11, XXVIII. RSA 200:29 further provides that "each school board may appoint a school nurse" and defines a "school nurse" as "a registered professional nurse currently licensed in New Hampshire." This definition accords with the standards established in existing ED 511.17.



Dr. Robert L. Brunelle, Commissioner
November 15, 1983
Page 2

The issue raised by your request for advice is whether the State Board of Education has authority to impose additional requirements on the qualifications defined by RSA 200. It is a well-established principle of administrative law that an administrative agency may not by regulation amend or modify a statute by prescribing limitations thought unnecessary by the legislature. C.B.S. Imports Corp. v. U.S., 450 F.Supp. 724, 728 (U.S. Cust. Ct. 1978); Bates v. U.S., 581 F.2d 575 (6th Cir. 1978); Madison v. Director of Department of Employment Security, 158 A.2d 154 (R.I. 1960); F. Cooper, State Administrative Law, p. 255 (1965).

The proposed amendment to ED 511.17 increases the qualifications necessary to act as a school nurse by requiring a Bachelor's degree, course-work and experience. These are additional requirements beyond what is required by statute. Furthermore, the duties of the Board as defined in RSA 186:11, XXVIII are specifically made subject to the provisions of RSA 200. Since the Board's authority to promulgate regulations relating to the certification of school nurses ultimately derives from the Board's duty to employ persons to care for the health of persons under RSA 186:11, XXVIII, the limitation in RSA 186:11, XXVIII, making the Board's authority subject to the provisions of RSA 200, limits the Board's authority to expand or decrease the qualifications prescribed by that chapter.

In closing, it should be noted that if the health care professional were employed in a position other than that stated in RSA 186:11, XXVIII, that the Board would have authority to define the qualifications necessary for that position. For example, if a health care professional were hired to teach courses in health, the Board could, by regulation, prescribe qualifications beyond those set out in RSA 200:29.

Very truly yours,



Leslie J. Ludtke
Assistant Attorney General
Division of Legal Counsel

LJL/smg
83-137-I